1986

The State of Utah v. Manual Lucero : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff-Respondent.	:	Case. No. 860213-CA
vs.	:	
MANUAL LUCERO,	:	Priority 2
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM CONVICTION OF MAKING A FALSE MATERIAL STATEMENT, A SECOND-DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-8-502 (1978), IN THE SEVENTH JUDICIAL DISTRICT COURT, IN AND FOR DUCHESNE COUNTY, STATE OF UTAH, THE HONORABLE BOYD BUNNELL AND THE HONORABLE RICHARD C. DAVIDSON, JUDGES PRESIDING

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BRIEF OF RESPONDENT

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Should the defendant's appeal be summarily dismissed where he failed to cite to the record in support of his statement of facts and argument on appeal?

2. Was the defendant properly denied his motion opposing state jurisdiction where he failed to comply with the federal removal statute and did not establish that he was entitled to removal under the applicable law?

CONSTITUTIONAL PROVISIONS AND STATUTES

The General Crimes Act, 18 U.S.C.A. § 1152, (West 1973)

The Major Crimes Act, 18 U.S.C.A. § 1153, (West 1973)

28 U.S.C.A. § 1446 (West 1973)

Rules of Utah Court of Appeals Rule 24(a)(7) (1987)

Rules of Utah Supreme Court Rule 24(a)(7) (1987)

Utah Code Ann. § 76-8-502 (1978)

See Addenda A through D.

STATEMENT OF THE CASE

Defendant, Manuel Lucero, was charged with making a false material statement, a second degree felony, in violation of Utah Code Ann. § 76-8-502 (1978) (R. 2).

Defendant was convicted of making a false material statement, a second degree felony, in violation of Utah Code Ann. § 76-8-502 (1978), on a guilty plea entered on March 12, 1986, in the Seventh Judicial District Court, in and for Duchesne County, State of Utah, the Honorable Boyd Bunnell, Judge, presiding (R. 53, 87). Defendant was sentenced by the Honorable Richard C. Davidson, Judge, on May 19, 1986, to the indeterminate term of not less than one nor more than fifteen years in the Utah State Prison (R. 61, 103). Execution of sentence was suspended and defendant was placed on probation for 18 months on the condition that he enter into an agreement with Adult Parole and Probation and abide by its terms; that he violate no State, federal, or municipal laws; that he pay a fine of $1,000; that he enter into and accept any therapy outline by Adult Parole and Probation; and that he serve twelve months in the Duchesne County Jail (jail sentence to be reviewed after four months to determine eligibility for early release) (R. 61, 103-04). Execution of defendant's jail sentence was stayed pending this appeal (R. 104).

STATEMENT OF THE FACTS

On September 10, 1984, the defendant testified in the case of Roosevelt City v. Patrick J. Hackford, Case No. 84-CR-124 (R. 70). During that trial, defendant testified that he and a

Dale Semple had taken Hackford to Myton, Utah, thus providing an alibi for Hackford at the time he and another man, Joe Lane, stole a car from Van Winterton just west of Roosevelt City on Highway 40 (R. 70-73, 79-80, 86-87).

Defendant was subsequently charged with making a false material statement in violation of Utah Code Ann. § 76-8-502 (1978) (R. 2, 87). At the preliminary hearing in the Seventh District Court, a transcript of defendant's previous testimony at Hackford's trial was presented as evidence (R. 68, 70-73), as well as the testimony of Joe Lane (R. 77-82). Lane testified that he and Hackford had stolen a Volkswagen and driven it to Myton the morning the defendant had previously testified he and Dale Semple had driven Hackford to Myton (R. 79-80). District Court Case Nos. 84-CR-055 and 056.

Based on the evidence presented at the preliminary hearing, the Seventh District found probable cause to believe that the defendant had made a false material statement under oath at a criminal proceeding. Defendant was, therefore, bound over for trial (R. 1, 3-7, 91).

Defendant was arraigned on March 4, 1985 (R. 17). Over twelve (12) months later, on March 12, 1986, defendant appeared, entered his guilty plea, and made an oral motion to the Seventh District Court contesting that court's jurisdiction, which the court requested be made in written form (R. 53). No written motion appears in the record; however, defendant filed a Memorandum in Support of Removal to Federal Court in the Seventh Judicial District Court on April 4, 1986 (R. 54-57). In that

Memorandum, the defendant claimed the crime took place in "Indian country," he was an Indian, that he was married to a member of the Ute tribe, that he lives in "Indian Country" within the meaning of 18 U.S.C.A.§ 1152, and that he holds himself out as a Ute and is treated as such by the Ute tribe (R. 54-57). At no time did the defendant offer the trial court any evidence of his Indian status.

Judgment was pronounced on May 19, 1986, at which time Judge Davidson denied defendant's motion regarding his objection to jurisdiction (R. 61).

SUMMARY OF THE ARGUMENT

Defendant's failure to cite to pages in the record to support his points on appeal requires this Court to assume regularity in the trial court's proceedings below and correctness in the judgment appealed from.

Further, defendant is not entitled to removal of his criminal prosecution for perjury for several reasons. First, he failed to properly petition to the federal district court for removal of his state criminal prosecution. Consequently, this issue is not properly before this Court. Second, even if his motion to the state court could be construed as a proper petition for removal to federal district court, this motion was not timely and in accordance with the federal removal statute. Therefore, state jurisdiction over his criminal proceeding was proper. And third, defendant carries the burden of showing he is entitled to removal to federal court. He has failed to offer any proof that he is an Indian within the meaning of 18 U.S.C.A.§ 1152 and is,

therefore, not entitled to federal jurisdiction over his case. Consequently, the state district court's exercise of jurisdiction over this case was proper, and the trial court was not in error.

ARGUMENT

POINT I

BECAUSE HE FAILED TO CITE TO THE RECORD TO SUPPORT HIS STATEMENT OF FACTS AND ARGUMENT IN HIS BRIEF, DEFENDANT'S APPEAL SHOULD BE SUMMARILY DISMISSED.

Rule 24(a)(7), R. Utah Court of Appeals (1987), requires that the defendant's brief contain a concise statement of the material facts of the case, citing to pages of the record which support such statement.[1] State v. Milligan, 727 P.2d 213, 214-215 (Utah 1986). Defendant has failed to comply with this rule. He cites to no pages of the record in support of his statement of facts. In State v. Sutton, 707 P.2d 681, 683 (Utah 1985), the Utah Supreme Court stated:

> This failure to satisfy Rule 75(p)(2)(d) of Utah Rules of Civil Procedure [now R. Utah Sup. Ct. Rule 24(a)(7)] (1987) and R. Utah Ct. App. Rule 24(a)(7)(1987)] is itself grounds for our affirmance of the trial court's ruling.

See also State v. Olmos, 712 P.2d 287 (Utah 1986); State v. Tucker, 657 P.2d 755, 756-57 (Utah 1982); and State v. Steggell, 660 P.2d 252, 253 (Utah 1983). In accordance with the holding of Sutton, this Court should assume the correctness of Judge Davidson's denial of defendant's motion contesting jurisdiction

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[1] Rule 24(a)(7), R. Utah Court of Appeals (1987), is virtually identical to Rule 24(a)(7) of R. Utah Supreme Court (1987). See Addendum A.

and the trial court's exercise of jurisdiction in general, and dismiss this appeal.

POINT II

DEFENDANT WAS NOT ENTITLED TO REMOVAL OF HIS CRIMINAL PROSECUTION FOR MAKING A FALSE MATERIAL STATEMENT (UTAH CODE ANN. § 76-8-502 (1978)) TO FEDERAL DISTRICT COURT.

A. Defendant Failed To Properly Petition To Federal District Court For Removal; Therefore, State Jurisdiction Over His Criminal Prosecution For Perjury Was Proper.

Defendant claims the State of Utah lacks jurisdiction over his perjury prosecution because he is an American Indian living on the Uintah and Ouray Reservation (Ute Reservation), the crime took place in Roosevelt City, which defendant claims is within the exterior boundaries of the Ute reservation, and the federal district court has jurisdiction over criminal activities of Indians committed in Indian Country pursuant to 18 U.S.C.A.§ 1152 to the preclusion of state jurisdiction. He further claims that, therefore, the trial court erred in denying his motion for removal to federal district court.

Section 1446, 28 U.S.C.A.(West 1973 & Supp. 1987), provides:

> (a) A defendant . . . desiring to remove any . . . criminal prosecution from a State court shall file in the district court of the United States . . . a verified petition containing a short and plain statement of the facts which entitled him . . . to removal together with a copy of all process, pleadings and orders served upon him . . . in such action.
>
> (b) . . . .

> (c)(1) A petition for removal of a criminal prosecution shall be filed no later than thirty days after the arraignment in the State court, or at any time before trial, whichever is earlier, except that for good cause shown the United States district court may enter an order granting the petitioner leave to file the petition at a later time.
>
> (2) . . . .
>
> (3) The filing of a petition for removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the petition is first denied.

(Emphasis added.) See also Wright, Miller & Cooper, 14A Federal Practice and Procedure, Jurisdiction § 3721 et seq. (1985).

Moreover, "[b]ecause the removal statutes constitute a congressionally authorized encroachment by the federal court upon the sovereignty of the state courts, they should be strictly construed and their procedures rigidly adhered to." People of the State of New York v. Mitchell, 637 F. Supp. 1100, 1102 (S.D.N.Y. 1986), citing People of the State of New York v. Bell, 617 F. Supp. 47 (E.D.N.Y. 1985); People of the State of New York v. Muka, 440 F. Supp. 33 (N.D.N.Y. 1977). See also State of Georgia v. Waller, 660 F. Supp. 952, 953-54 (M.D. Ga. 1987) (District Court held that compliance with the procedural requirements of 28 U.S.C.A.§ 1446 (West 1973 & Supp. 1987) was required for actual removal of a state criminal prosecution); Smith v. State of Indiana, 622 F. Supp. 973, 974-75 (D.C. Ind. 1985) (provision requiring petition to be filed before trial held imperative and mandatory, to be strictly complied with and

narrowly construed); and State of New Jersey v. Chesimard, 555 F.2d 63, 65 (3d Cir. 1977).

Defendant did not file any petition for removal in the federal district court for Utah. Instead, he made an oral motion to the state trial court in opposition to state jurisdiction, and followed this up only with a written memorandum in support of such motion (R. 53, 54-57). Because defendant made his motion to the wrong court, the State trial court could not have passed on the motion, even if it had been inclined to grant it. He, therefore, has failed to strictly comply with the mandatory and strict procedural requirements of 28 U.S.C.A.§ 1446 (West 1973 & Supp. 1987), and his appeal should be dismissed as not properly before this Court. Wright v. London Grove Township, 567 F. Supp. 768, 770 (E.D. Penn. 1985) (defendants seeking removal bear burden of establishing that the requirements for removal are met).

Moreover, since "[t]he removal statute is not intended as a means of aborting or interrupting a state trial[,]" Mitchell, 637 F. Supp. at 1103, the trial court's exercise of jurisdiction was proper, and it was not error for Judge Davidson to deny defendant's motion in opposition to jurisdiction.

B. Even Assuming The Motion To The State Trial Court Objecting To State Jurisdiction Could Be Construed A Proper Petition For Removal, It Would Have Been Dismissed As Untimely.

As noted previously, 28 U.S.C.A.§ 1446(c)(1) (West Supp. 1987) requires a petition for removal to be filed with the federal district court within thirty days after arraignment in

the state court or any time before trial (before the jury is impaneled), whichever is earliest. See also Waller, 660 F. Supp. at 953-54, and Smith, 622 F. Supp. at 974-75. Further, a defendant may lose or waive his right to remove by taking some substantial defensive action in the state court before petitioning for removal, such as filing a counterclaim or engaging in discovery. Wright, Miller, & Cooper, 14A Federal Practice and Procedure, Jurisdiction § 3732 (1985).

In the present case, the defendant was arraigned on the perjury charge on March 4, 1985 (R. 17). He made his oral motion objecting to state jurisdiction over a year later, on March 12, 1986 (R. 53). Nothing written was filed contesting state jurisdiction until April 4, 1986, some thirteen months after arraignment. Clearly, defendant's motion, assuming in arguendo it was a proper petition for removal, was not timely. Defendant has also failed to show any good cause for allowing a late petition as required by 28 U.S.C.A.§ 1446(c)(1) (West Supp. 1987). Additionally, defendant pleaded guilty in state court before making his motion opposing jurisdiction, thus waiving any right to remove to federal court. During the pronouncement of the judgment, defense counsel noted that he had reserved the right to challenge jurisdiction of the trial court at the time defendant pleaded guilty. However, no such reservation appears in the record, and defendant has not cited to the record to support this claim. See discussion, Point I at 4, and authorities cited therein.

C. Defendant Has Made No Showing Of His Indian Status For The Purpose Of 18 U.S.C.A.§ 1152; Therefore, He Has Failed To Meet His Burden Of Showing He Is Entitled To Removal To Federal Court.

Defendant asserts that his right to removal is based on 18 U.S.C.A.§ 1152, the General Crimes Act, which provides:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian Country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.[2]

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[2]The Major Crimes Act, 18 U.S.C.A.§ 1153, provides:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

This statute does not included the crime of perjury; therefore, defendant's prosecution is not within the exclusive jurisdiction of the federal courts. His only hope for federal jurisdiction is 28 U.S.C. § 1152, the General Crimes Act, and, as demonstrated in Point II C, at 10 , that provision does not apply. Consequently, defendant's criminal prosecution was properly within the state trial court's jurisdiction.

In order to prosecute an individual under the General Crimes Act, the federal government is required to prove, as a jurisdictional requisite, that the crime occurred between an Indian and a non-Indian within Indian country, and that the crime was in violation of a federal enclave law. 28 U.S.C.A.§ 1152 and United States v. Torres, 733 F.2d 449, 454 (7th Cir. 1984), citing United States v. Wheeler, 435 U.S. 313, 324-25 (1978); United States v. Blue, 722 F.2d 383, 384-85 (8th Cir. 1983); United States v. John, 587 F.2d 683, 686-87 (5th Cir.) (on remand from the United States Supreme Court), cert. denied, 441 U.S. 925 (1979); F. Cohen, Handbook of Federal Indian Law 287-300 (1982).

Further, the United States Supreme Court has held that, for purposes of 18 U.S.C.A.§ 1152, crimes committed by non-Indians against non-Indians, in Indian country, are subject to state jurisdiction. United States v. McBratney, 104 U.S. 621 (1881); New York ex rel. Ray v. Martin, 326 U.S. 496 (1946).

In Torres, 733 F.2d at 456, the Seventh Circuit Court of Appeals noted that, upon a review of relevant case law,

> "[t]he test [for Indian status], first suggested in United States v. Rogers, 45 U.S. 567, 4 How. 567, 11 L. Ed. 1105 (1845), and generally followed by the courts, considers (1) the degree of Indian blood; and (2) tribal or governmental recognition as an Indian." (Emphasis added) United States v. Broncheau, 597 F.2d at 1263. See also United States v. Dodge, 538 F.2d at 786; F. Cohen, Handbook of Federal Indian Law, 23-27 (1982).

As the moving party challenging the lower court's jurisdiction, Lucero carries the initial burden of producing sufficient evidence, beyond mere suppositions or allegations to establish a jurisdictional question. Yeazell v. Copins, 98 Ariz.

109, 402 P.2d 541, 546 (1965), and United States v. Hester, 719 F.2d 1041 (9th Cir. 1983). Since the basis of his jurisdictional challenge is that he is an Indian, he carries the initial burden of producing prima facie evidence to establish such. Hester, supra. Moreover, Lucero, the defendant seeking removal to federal district court from a state criminal prosecution, bore the burden of establishing that the requirements for such removal were met. Wright v. London Grove Township, 567 F. Supp. at 770, citing Wilson v. Republic Iron and Steel Co., 257 U.S. 92 (1921).

While defendant here has alleged that he is an Indian, is married to a Ute Indian, lives in Indian country by virtue of his residence in Roosevelt City, Utah, holds himself out to be a Ute Indian, and is treated by the tribe as such, he offered no proof to the trial court to substantiate these claims. Such mere allegations are insufficient to show that he is an Indian pursuant to 28 U.S.C.A.§ 1152 and thus entitled to removal and federal jurisdiction.

Because the defendant failed to prove he is an Indian within the meaning of § 1152, he fails to meet the first requirement for federal jurisdiction; consequently, there is no need to discuss whether the crime occurred in Indian country or

was a violation of federal enclave law.[4]

CONCLUSION

In summary, the defendant's appeal should be summarily dismissed because he failed to substantiate his claim of error by citing to the record on appeal. Moreover, the defendant failed to properly petition for removal to federal district court, did not present any objection to state jurisdiction in a timely manner, and did not meet his burden of establishing he was entitled to removal. Therefore, the decision and sentence of the Seventh Judicial District Court should be affirmed.

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[4] Perjury is a violation of federal enclave law through the Assimilated Crimes Act, 18 U.S.C. § 13, which provides:

> Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title [18 U.S.C. § 7], is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

However, the status of Roosevelt City and the surrounding area as within Indian Country is discussed fully in Respondent's Brief to the Utah Supreme Court in State v. Clinton Perank, Case No. 860243, at 17-48, March 4, 1987, wherein it is demonstrated that Lucero's acts were not committed within Indian Country. Perank is tentatively scheduled for oral argument in the Supreme Court in October, 1987, pending a filing of an amicus brief by the Ute Tribe. For this additional reason, state jurisdiction was proper.

DATED this 10th day of August, 1987.

DAVID L. WILKINSON
Attorney General

EARL F. DORIUS
Assistant Attorney General

MAILING CERTIFICATE

I hereby certify that on the 10th day of August, 1987, I caused to be mailed, postage prepaid, four (4) true and exact copies of the above and foregoing Brief of Respondent to Dixon D. Hindley, D. Aron Stanton and Associates, 255 East Fourth South, Suite 101, Salt Lake City, Utah 84111.

ADDENDUM A

Rules of the Utah Supreme Court, Rule 24(a)(7) and 24(e) (1987)

(a) **Brief of the appellant.** The brief of the appellant shall contain under appropriate headings and in the order here indicated:

(7) a statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. There shall follow a statement of the facts relevant to the issues presented for review. All statements of fact and references to the proceedings below shall be supported by citations to the record (see Paragraph (e)).

(e) **References in briefs to the record.** References shall be made to the pages of the original record as paginated pursuant to Rule 11(b), to pages of the reporter's transcript, or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to exhibits shall include exhibit numbers. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the transcript at which the evidence was identified, offered, and received or rejected.

Rules of the Utah Court of Appeals, Rule 24(a)(3) and (7), and Rule 24(e) (1987)

(a) **Brief of appellant.** The brief of the appellant shall contain under appropriate headings and in the order here indicated:

(3) A table of authorities with cases alphabetically arranged and with parallel citations, agency rules, court rules, statutes, and other authorities cited, with references to the pages of the brief where they are cited.

(7) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. There shall follow a statement of the facts relevant to the issues presented for review. All statements of fact and references to the proceedings below shall be supported by citations to the record (see Paragraph (3)).

(e) **References in briefs to the record.** References shall be made to the pages of the original record as paginated pursuant to Rule 11(b), to pages of the reporter's transcript, or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to exhibits shall include exhibit numbers. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the transcript at which the evidence was identified, offered, and received or rejected.

ADDENDUM B

18 U.S.C.A. § 1152 (West 1973), The General Crimes Act

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

(June 25, 1948, c. 645, 62 Stat. 757.)

18 U.S.C.A. § 1153 (West Supp. 1987), The Major Crimes Act

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnaping, maiming, rape, involuntary sodomy, felonious sexual molestation of a minor, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

(As amended Oct. 12, 1984, Pub.L. 98-473, Title II, § 1009, 98 Stat. 2141; May 15, 1986, Pub.L. 99-303, 100 Stat. 438; Nov. 10, 1986, Pub.L. 99-646, § 87(C)(5), 100 Stat. 3623, Nov. 10, 1986, Pub.L. 99-654, § 3(a)(5), 100 Stat. 3663.)

ADDENDUM C

28 U.S.C.A. § 1446 (West 1973 and Supp. 1987), Procedures for removal:

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

(b) The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

(c) (1) A petition for removal of a criminal prosecution shall be filed not later than thirty days after the arraignment in the State court, or at any time before trial, whichever is earlier, except that for good cause shown the United States district court may enter an order granting the petitioner leave to file the petition at a later time.

(2) A petition for removal of a criminal prosecution shall include all grounds for such removal. A failure to state grounds which exist at the time of the filing of the petition shall constitute a waiver of such grounds, and a second petition may be filed only on grounds not existing at the time of the original petition. For good cause shown, the United States district court may grant relief from the limitations of this paragraph.

(3) The filing of a petition for removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the petition is first denied.

(4) The United States district court to which such petition is directed shall examine the petition promptly. If it clearly appears on the face of the petition and any exhibits annexed thereto that the petition for removal should not be granted, the court shall make an order for its summary dismissal.

(5) If the United States district court does not order the summary dismissal of such petition, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the petition as justice shall require. If the United States district court determines that such petition shall be granted, it shall so notify the State court in which prosecution is pending, which shall proceed no further.

(d) Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

(e) Promptly after the filing of such petition for the removal of a civil action and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(f) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court.

(As amended July 30, 1977, Pub.L. 95-78, § 2, 91 Stat. 321.)

ADDENDUM D

Utah Code Ann. § 76-8-502 (1978):

76-8-502. False or inconsistent material statements.—A person is guilty of a felony of the second degree if in any official proceeding:

(1) He makes a false material statement under oath or affirmation or swears or affirms the truth of a material statement previously made and he does not believe the statement to be true; or

(2) He makes inconsistent material statements under oath or affirmation, both within the period of limitations, one of which is false and not believed by him to be true. In a prosecution under this section, it need not be alleged or proved which of the statements is false but only that one or the other was false and not believed by the defendant to be true.